The monopoly in sport events and competition law

The contribute of the International Skating Union's Eligibility Rules Anti-Trust Procedure to the change of paradigm

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Master dissertation - Master of Transnational Law

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Abstract:

In the last decades, the sport has suffered a great development, especially in the economic level. In fact, the sport moves enormous sums of money and has acquired a very important role in the national and international markets. For this reason and many others, the regulation of the sport activity requires special attention. However, purely sporting issues are rare nowadays and the margin of autonomy for the sport governing bodies becomes smaller and smaller. One of the situations in which this is particularly evident is the organization and commercial exploitation of sports competitions. We propose to analyse the admissibility of the current scheme of the organization of such events. To that purpose, we analyse the investigation of the European Commission to the ISU regulations, in particular the eligibility rules. We found that such a structure is not compatible with competition rules. Thus, we present some proposals for structural reforms of sports governing bodies.

Key words:

Competition Law, article 101, European Commission, restriction, sports, speed skating, ISU – International Skating Union, regulations.

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Table of abbreviations

art., arts.	-	article, articles
bibl.	-	bibliography
c., cc.	-	chapter, chapters
CAS	-	Court of Arbitration for Sport (Tribunal Arbitral du Sport)
cit.	-	cited, citation
EC	-	European Commission
ECJ, The Court	-	European Court of Justice
et al.	-	et alii, et aliae, et alia, latin for "and others"
EU	-	European Union
Idem, id.	-	latin for “the same”
ISU	-	International Skating Union
p., pp.	-	page, pages
parag.	-	paragraph, paragraphs
TEU	-	Treaty on European Union
TFEU, the Treaty	-	Treaty on the Functioning of the European Union
v.g.	-	verbi gratia, latin for “for example”

Introduction

This dissertation was made for the conclusion of Master of Transnational Law of the Universidade Católica Portuguesa in the partial fulfilment of the national requirements for the degree. It is inserted in the field of European Competition Law and its application to sports.

In last decades, the growing development and professionalization of sporting structures has revealed the special attention that is required in the enforcement of the law to this particular sector. This difficulty has been experienced either by national or international authorities. It is true that the position of sports governing bodies is not typical: they are guided by public and private purposes which, in part, motivates the arose of those question. On the one hand, clubs, regional and national federations and other have an important role with relevance for the public interest, v.g. the promotion of physical activity and other relevant values in sport; on the other hand, they also pursue interests that are typical from private entities.

In this sense, the public authorities cannot leave sports (and specially sports governing bodies) to self-regulation. However, it is equally true that these same sports bodies have increasingly called for greater autonomy for their actions.

These conflicting interceptions may become more evident in what concerns competition law. Several Member States do not have very specific or developed regulations in this field and have benefited from the provisions of the Treaties of the Union. This regulation creates a grey area to add to that friction between public authorities and sports bodies referred to above.

The ECJ has already ruled on this issue in the context of the MOTOE case in which the fragility of this matter was evident. But the impact of this decision was not as great as it might have been expected.

Thus, taking the anti-trust procedure initiated by the European Commission to the eligibility rules of the ISU, it is our intention to analyse the decision that came out of the procedure, to perceive the impact that it may have and to point out some solutions to the issues that arise in the same decision.

To that purpose, we will start by reviewing some structural aspects of European competition law, in particular the concepts of Article 101 TFEU. After that, we will proceed to the analysis of the Commission 's decision mentioned above, namely the origin of this case and the reasoning of the Commission for application to the case of Article 101.

Finally, we recall some important aspects of the MOTOE case, some predictions for the outcome of this case and suggestions for the reform of the sport structure.

Chapter I - Competition Law in the European Union

The creation of the internal market is one of the aims of the European Union: it was present since the very beginning of the integration process[1] and, nowadays, it still is one of the objectives of the European project[2].

To achieve that purpose, the Treaties brought the economic freedoms, but competition law became a very important tool to complement that discipline[3]. Either norms on economic freedoms or competition rules are autonomous but combining both disciplines in EU primary law provides a wide range of tools for the institutions to pursue the European ambitions.

The main provisions of the TFEU concerning competition law are article 101 and 102[4] [5]. The content of these provisions is negative which means that they do not impose any particular behaviour to the EU institutions, Member States, economic actors, citizens, etc. They just impose that the actions of the economic actors do not violate what is described in the norm. "*Negative law refers to laws that prohibit particular practices – broadly, those that conflict with the objective of creating and maintaining the EU's internal market. (…) The application of these provisions is predominantly the preserve of the Court and of national courts, though the Commission too plays a direct role in securing observance of competition rules"*[6].

[1] The Schuman Declaration of 9 May 1950, paragraph 6.
[2] Jean Claude Juncker in the Speech of the State of the Union 2018: The hour of European Sovereignty, Authorised version of the State of the Union Address 2018, Available at https://ec.europa.eu/commission/priorities/state-union-speeches
[3] *A third objective is to facilitate the creation of a single European market, and to prevent this from being frustrated by private undertakings.* (Paul Craig and Gráinne de Búrca. *EU law, Text, cases, and materials*. New York: Oxford University Press, 2015), 1002.
[4] Paul Craig and Gráinne de Búrca. *EU law, Text, cases, and materials*. (New York: Oxford University Press, 2015), 1001 and 1055.
[5] Competition law rules can be found in many documents of secondary law of the EU, such as Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation, but in terms of primary law those are the principal dispositions. "*Legal control of mergers is an important component of competition policy. EU regulation of mergers was however a long time coming. Articles 85 and 86 ECC (now articles 101 and 102 TFEU) made no specific mention of mergers. The Commission atempted to fill this gap as early as 1973. While the Member States recognised that merger control was necessary, they disagreed on the boundary between EU and national merger control, and on the precise form of EU control.* (Paul Craig and Gráinne de Búrca. *EU law, Text, cases, and materials"* (New York: Oxford University Press, 2015), p.1090)
[6] Stephen Weatherill, *Principles and practice in EU sports law,* (Oxford: Oxford University Press, 2017), 57.

Besides the central point of competition law mentioned before, the adoption of such policy follows other purposes: enhance efficiency and protection of consumers[7], is one example.

1. Article 101 – main aspects

Article 101 is dedicated to anti-competitive practices in various forms: agreements, decisions and concerted practices; while article 102 refers to the abuse of dominant position.

Our attention will be focused on article 101. This provision prohibits any practice of undertakings or associations of undertakings that may represent an inhibition ("*prevention, restriction or distortion"*[8]) to competition inside the internal market. In order to cover any behaviour of that kind, the norm is built with concepts such as "*undertakings/association of undertakings*, *agreements*, *decisions* or *concerted practices"*[9] that are not defined in the Treaty. Alternatively, the scope of those concepts is developed by the European Court of Justice or the Commission.

Undertakings

In the case that will be further analysed, the concepts of undertaking and association of undertakings were essential for the final decision of the Commission. According to the ECJ, the concept of undertaking "*covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed"*[10] and the Commission follows the same line in their assessments[11]. As a result, the European institutions adopt a very broad concept of undertaking and association of undertakings for the application of competition rules.

Agreements, decisions and concerted practice

[7] Paul Craig and Gráinne de Búrca. *EU law, Text, cases, and materials*. (New York: Oxford University Press, 2015),1001 and 1002.
[8] TFEU article 101.
[9] Idem.
[10] Case C-437/09, AG2R Prévoyance v Beaudout Père et Fils SARL (2011), ECLI:EU:C:2011:112, parag.41. For a convergent view see Case C-41/90, *Höfner and Elser*, (1991) ECR I-1979, paragraph 21, and Case C-280/06, *ETI and Others*, (2007), ECR I-10893, paragraph 38.
[11] E.g. Decision EC Number 36834, 26 August 1999, FENIN/SNS+Spain.

Other important concepts to understand article 101 are agreements, decisions and concerted practices. First, it is important to notice that competition rules do not solely apply to formal agreements, decisions or concerted practices. They are also used in less formal ways[12], otherwise it would be very difficult to achieve the goals of competition law. One example is the case Polypropylene[13], the Commission stated that *"it is not necessary, in order for a restriction to constitute an 'agreement' within the meaning of Article 85 (1) for the agreement to be intended as legally binding upon the parties (...) Nor is it necessary for such an agreement to be made in writing."*[14]

Regarding the concept of agreement, it is "*sufficient that the undertakings should have expressed their joint intention to conduct themselves on the market in a specific way"*[15].

As far as concerted practices are concerned, the Commission considers that it is in fact a cooperation commitment between undertakings through conscious and coordinated conduct (although not bound to any formality) with the intention of preventing the usual market risks. This is often the case of markets which operate in the form of oligopolies. These are constituted by a small number of companies and characterized by the existence of great barriers to the entry of new companies for which the product offered is not very differentiated. In this scenario, "*price uniformity really is the result of rational action"*[16] and there are theories defending that there is no actual collusion in such practice, so "*it is not sensible to penalize such parties through fines for colluding"*[17].

Restriction by object and restriction by effect

The aforementioned article refers that practices taken by undertakings that have as their object or effect the distortion of competition. Nonetheless, some practices are

[12] Paul Craig and Gráinne de Búrca. *EU law, Text, cases, and materials*. (New York: Oxford University Press, 2015), p.1004.
[13] 86/398/EEC: Commission Decision of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 - Polypropylene)
[14] 86/398/EEC: Commission Decision of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 - Polypropylene) Paragraph 81.
[15] Idem.11, p.1006.
[16] Idem. 11, p.1007.
[17] Idem.

anti-competitive by nature. The Treaty itself mentions some situations that evidence that: price fixing or limitation of imports and exports.

Regardless, for some cases the inherent anti-competitiveness is only exposed once its effects or consequences are analysed. It is common practice that once the Commission or the ECJ finds a practice that is, by object, restrictive, they do not proceed to analyse its effects.

Either the object or the effects are indicators that by its nature are disassociated as they constitute different criteria to access the legality of practices in the light of competition law. Therefore, once one of them is fulfilled, there is no necessity to examine the other[18]. However, as we will see further, it is not easy to dissociate one from another and it raises problems.

In cases such as *ICI v. Commission*[19] or *Suiker Unie*[20], the Union Court analysed concerted practices by examining the effects on the market. As a result, they declared that effects are the essence of the concerted practice and cannot be separated from it. But, in the case *Anic*,[21] the Advocate General demonstrated that there could be concerted practices that violate Article 101 by object without attending to the actual effects: *"…what constitutes a concerted practice whose 'object' is anticompetitive must in the end be determined on the basis of a reading of Article 85 as a whole which is such as to safeguard the rational coherence of that provision and, above all, with reference to the objective which the rules on competition seek to serve both generally and with specific regard to Article 85 (systematic and teleological interpretation)."*

[18] Case C-32/11, Allianz Hungária Biztosító and Others, (2013) ECLI:EU:C:2013:160, *Accordingly, where the anti-competitive object of the agreement is established it is not necessary to examine its effects on competition. Where, however, the analysis of the content of the agreement does not reveal a sufficient degree of harm to competition, the effects of the agreement should then be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent*.

[19] Case C- 48/69, Imperial Chemical Industries Ltd. v Commission of the European Communities, (1972), ECLI identifier: ECLI:EU:C:1972:70

[20] Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities, (1975), ECLI identifier: ECLI:EU:C:1975:174

[21] Case C-49/92 P, Commission of the European Communities v Anic Partecipazioni SpA, (1999), ECLI:EU:C:1999:356

In what concerns the restriction by object, the case law[22] reveals that the search begins by attending to the object of the agreement. Here the case law is consistent: if the object of the agreement was anti-competitive then it could be condemned without pressing further. In other words, if the content and intention[23] of certain agreement is to restrain free competition in the market, then such agreement is anti-competitive and violates EU law.

Following the examination of the object or concerted practice, if is not clear that they infringe the rules on competition, it is necessary to examine the effects of such provision or concerted practice. This is justified by the fact that though the object / nature of the practice may not violate the competition rules, its effects may reveal this prevarication.

To better determine the effects of a particular agreement or practice in the internal market, the Court (and the Commission) has been taking in consideration the unique circumstances of the case, as well as the legal and economic context. But the Court keeps in mind that *"the EU competition rules have been influenced by the desire to create a single market (...) agreements that have the effect of partitioning the market along national lines will, therefore, be treated harshly"*.

The analysis of the effects of a particular practice is not reduced to a list of criteria for a deductive test. This part takes a much more subjective view. If the subject of the analysis (undertaking or association of undertakings) passes the filter of the restriction by object, the task of demonstrating that the practice subject to investigation does not breach competition rules is much easier. This is because that subjectivity gives the undertaking or association of undertakings have the change to explain and reformulate the whole question in a way that can be accepted by EU institutions.

For a better understand this situation, we could compare the findings of cases of *John Deere*[24] and *Equifax*[25]. In the case of John Deere, the Advocate General stated that

[22] Joined Cases 56 and 58/64, Consten and Grundig v Commission, (1966) ECLI:EU:C:1966:41; Case C-209/07, Competition Authority v Beef Industry Development Society Ltd and Barry Brothers, (2008), ECLI:EU:C:2008:643

[23] It is not necessary that the restriction of the market is the sole or principal aim.

[24] Case C-7/95 P, John Deere Ltd v Commission of the European Communities, (1998) ECLI:EU:C:1998:256.

[25] Case C-238/05, Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc), (2006) ECLI:EU:C:2006:734.

the registry provoked the reduction of uncertainty in the market which constitutes a violation of article 101 (at that time, Article 85): *"The effect of the agreement was very considerably to increase the transparency of that market and as a result to reduce uncertainty regarding the commercial strategies of competing undertakings. (...) Determination of the effects of an agreement on competition constitutes a complex economic appraisal and the Court of Justice has held that, although it should undertake a comprehensive review of whether the conditions for the application of Article 85(1) are fulfilled, its review of complex economic appraisals by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers."*[26] The Court agreed with the Advocate General.

However, in *Equifax*, the Advocate General found the sharing of information between banks to be acceptable and non-restrictive of competition law. Advocate General Geelhoed declared that such practice was even positive for the market and the Court also agreed: *"the appraisal of the effects of agreements or practices in the light of Article 81 EC entails the need to take into consideration the actual context to which they belong, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question (...) According to the case-law on agreements on the exchange of information, such agreements are incompatible with the rules on competition (...) the compatibility of an information exchange system, such as the register, with the Community competition rules cannot be assessed in the abstract. It depends on the economic conditions on the relevant markets and on the specific characteristics of the system concerned (...)Under Article 81(3) EC, it is the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration, not the effect on each member of that category of consumers. Moreover (...) registers such as the one at issue in the main proceedings are, under favourable conditions, capable of leading to a greater overall availability of credit, including for applicants for whom interest rates might be excessive if lenders did not have appropriate knowledge of their personal situation".*[27]

[26] Case C-7/95 P, John Deere Ltd v Commission of the European Communities, (1998) ECLI:EU:C:1998:256. Parag. 48 and 55.
[27] Case C-238/05, Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc), (2006) ECLI:EU:C:2006:734. Parag. 49, 51, 54, 70 and 71.

Conditions for inapplicability

Any practice or agreement found restrictive under article 101(1) may be exempted if it fulfils one of the special conditions of Article 101(3). In other words, an agreement or practice may not be designated as anti-competitive if it corresponds to one of the provisions of article 101(3). First and foremost, the agreement or practice in question must follow one of the below conditions:

- It improves the production or distribution of goods; or
- If it promotes technical or economic progress;

  Besides, it must accomplish the following:
- Provide to the consumers a fair share of the resulting benefits;
- It must not contain restrictions which are indispensable to the attainment of the agreement's or practice's objectives, which means that it is essential that the restriction does not impose more costs apart from the absolutely inevitable;
- It cannot lead to the elimination of competition, it must allow other choices on the market for the consumers.

The importance of competition law pushed the work by the European institutions forward and urged the development of these provisions and its implementation. In this sense, the Council[28] established that the party or authority claiming the infringement of article 101(1) must prove that infringement. However, the undertaking or association of undertakings must prof the realization of article 101(3) to acquire the benefit.

Later in this dissertation, we will discuss that the Commission collected information from a number of Court decisions for similar cases to build a test to find if the undertaking or association of undertakings fulfils the conditions of article 101(3).

2. Sports and Competition law

Sports governing bodies claim autonomy to the sports universe and its' ruling. The literature, courts and other public authorities (such as the Commission) agree but only to a certain extent.

[28] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

The truth is that the limits of sports autonomy is blur. In spite of the implicit principle that conduces the parties to resort to the sports entities in case of conflict (such as the Arbitral Tribunal for Sport), there are a number of issues which seem to only concern with purely sporting matters (and therefore acceptable to be dealt with within sport bodies), but subsequently revealed great interest in national and international ordinary legal systems. Some iconic examples of those situations are the cases *Meca-Medina*[29] and *Deliège*[30]. Nonetheless, they ended up being argued in the ordinary judicial system and by the European institutions.

In the case of sports, it is frequently discussed whether sports interveners (such as governing bodies or clubs) may be classified as associations of undertakings. The European institutions had the opportunity to pronounced about this question and the conclusion is that sports governing bodies (v.g. FIFA, FIBA, ISU, etc.) are associations of undertakings within the meaning of the Treaty.

The Court remembered that sport is subject to European Union law and "*football clubs engage in economic activities"*[31], not only practice of sports, so they are undertaking in the meaning of article 101. Further, it is mentioned that clubs are members of national associations that also engage in economic activities and by their turn are affiliated to international which make them associations of undertakings[32]. Following that reasoning, the Commission classified UEFA as an association of undertakings in the meaning of article 101[33].

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[29] Case C-519/04 P, David Meca-Medina and Igor Majcen v Commission of the European Communities, 18 July 2006, ECLI identifier (ECLI): ECLI:EU:C:2006:492

[30] Joined cases C-51/96 and C-191/97, Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97), (2000), ECLI identifier: ECLI:EU:C:2000:199

[31] 2003/778/EC: Commission Decision of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League), Parag.106.

[32] v.g. Case 36/74, B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo, 12 December 1974, ECLI identifier: ECLI:EU:C:1974:140 parag. 4; Case 13/76, Gaetano Donà v Mario Mantero, 14 July 1976, ECLI identifier: ECLI:EU:C:1976:115, parag. 12; Case C-415/93, Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman, Royal Club Liégeois SA v Jean-Marc Bosman and others and Union des Associations Européennes de Football (UEFA) v Jean-Marc Bosman, 15 December 1995. ECLI identifier: ECLI:EU:C:1995:463, parag. 73; Case C-176/96, Case C-176/96, Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération Royale Belge des Sociétés de Basketball ASBL (FRBSB), 13 April 2000, ECLI identifier: ECLI:EU:C:2000:201 parag. 32 and 33.

[33] 2003/778/EC: Commission Decision of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League), Parag. 105 – 109.

The classification of clubs as undertakings and, in consequence, the governing bodies as association of undertakings was essential for the case that will be further analysed. After this classification, it became clear that clubs and governing bodies are subject to European law and, specifically, competition law.

The chance to make a closer approach to competition law and sports appears very often but the Court of Justice usually takes an alternative way[34]. However, at some point the examination of the collusion between competition law and sports was inevitable. The pyramid structure is very "permeable" to the free internal market as it is pointed by Weatherill*: "Most of the sports-related case since Bosman and Deliége have dealt with the application of EU competition law rather than free movement rules (…) The regulation of sport, typically conducted according to networks of agreements between sport governing bodies and participants, and underpinned by the typically global reach of a single rule-maker, is plainly vulnerable to supervision according to dictates of EU competition law"*[35].

Besides, the "purely sporting rules" also connects with the conditional autonomy. The concept of "purely sporting rules" was already used by the Court in Meca-Medina[36] and defined it as *"rules concerning questions of purely sporting interest and, as such, having nothing to do with economic activity"*[37] This means that, even though the subjects and their practices must comply with EU law, there might be practices that only concern sports' issues and do not fall within the scope of the article 101.

Another example of a critical situation was the case ENIC/UEFA[38], where the Commission investigated whether norms prohibiting the ownership of more than one club was a restrictive practice. In the first approach it was clear that it was a restrictive practice and was under the scope of article 101. However, it was as an essential and irreplaceable measure to prevent integrity of sports and independence of clubs: *"ENIC follows Wouters*

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[34] "*…[about Bosman] having found violations of the free movement rules, the Court simply declined to discuss the relevance of competition law… In Deliége the Court considered it had not been provided with sufficient information, most of all about the structure of the marker, to be able to supply an informed ruling*" Stephen Weatherill, *Principles and practice in EU sports law,* (Oxford: Oxford University Press, 2017), 104.

[35] Stephen Weatherill, *Principles and practice in EU sports law,* (Oxford: Oxford University Press, 2017, 104.

[36] Case C-519/04 P, David Meca-Medina and Igor Majcen v Commission of the European Communities, (2006) ECLI:EU:C:2006:492.

[37] Idem. Parag.41.

[38] Case COMP/37 806: ENIC/ UEFA, 25.06.2002.

(…) Within the interpretation and application of EU competition law and subject to the controlling requirement that measures must be limited to what is necessary to ensure the implementation of legitimate objectives" [39]

All these problems generally presented illustrate the necessity to take a deep and careful analysis of EU law where it relates to sports. The sports sector is full of specificities that must be considered in order to provide a coherent, just and efficient application of EU law.

[39] Stephen Weatherill, *Principles and practice in EU sports law,* (Oxford: Oxford University Press, 2017), 108.

Chapter II – The Anti-trust Procedure – Case AT.40208 – International Skating Union's Eligibility Rules

1. Case overview

a. The complaint

This case originated with a complaint from two Professional speed skaters residents in the Netherlands named Mark Tuitert and Niels Kerstholt. They were members of the Royal Netherlands Skating Federation as professional speed skaters. In that position, the athletes claimed that the 2014 Eligibility rules represented a violation of the European competition rules. In particular, imposing a lifetime ban for athletes and officials that take part on competition not authorized by the International Skating Union present on rule 103.

The speed skaters also argued that such rules impeded them from participating in other competitions that would provide them good earnings, so, in their view, that represented a restriction to their freedom to provide services.

Besides the arguments of the parties involved, the European institutions usually tend to analyze the complaint under the rules of market freedoms and its restrictions. However, in this particular case, the Commission took a different path and made the decision according to the rules of competition and market restrictions. This is interesting because from decades the Court has been avoiding dealing with those matters as much as possible in the cases that may have a connection with those rules.

b. Circumstances

This decision may represent a very important mark in the sports industry. Like we mentioned before, sports always claim a large margin of autonomy due to the specificity of the activity.

In this context, States have been losing the capability to control the limits of that autonomy. Sports became very important not only in the social context but also in economics. Football is the paradigmatic example of the economic role of sports. It

generates millions in taxes and to a certain extent it brings a certain dynamic to the economy. Therefore, if the government hypothetically tries to implement any measure that threats the autonomy of sports industry, the governments must be aware that the federation of that country may be excluded from various competitions. It is easy to imagine the Olympic Games or the Worlds Football Cup without Switzerland, Portugal or Italy, it happens occasionally due to different circumstances. But it is not so easy to imagine the same competitions without Germany, Spain, France, Italy, Portugal and the other Member States of the European Union that have an ancient role in the sports competitions.

In this context, the European Union plays a very important role as the sole entity with means to impose effective changes and limits to the sports industry. It is an entity with enough power to inflict changes regardless of a direct link to any federation which prevent them from risks that States usually face.

It became clear that the European Union has a privileged position to impose limits and inflict changes in sports. That happened before with the Bosman case, Olivier Bernard, MOTOE and others, even though those changes were made by the Court of Justice of the European Union. Regarding the complaint that we are presently analysing, it is worth mentioning that it was argued by the European Commission that has different functions and its decisions have other scope.

So, the EC took this chance to enforce its position in several matters that, at the first sight, were not directly related with the initial complain. For example, gambling was subject that emerged in the exchange of statements between the Commission and ISU.

Therefore, to analyse the complaint the Commission starts by contextualizing the particular structure where sports is inserted. Ice skating is a sports activity inserted in a pyramidal structure. This type of organizing scheme is characterized by the existence of an international entity that heads the pyramid and have some sort of control over the following (international sports federations, such as ISU in this case, FIFA in case of football or FIBA in case of basketball). This entity is followed by its members: regional sports associations, national sports associations, clubs and, finally athletes.

The Commission takes in consideration the White Paper on Sports from 2007 and remembers that this is not the only solution for the organization. There are other alternatives in relevant activities such as golf and cycling. This is especially relevant to limit the relevant market and further assess the violation of article 101.

c. Applicable rules and practices

The EC's investigation observed the ISU Constitution and General Regulations. In particular, rule 102 and 103 that are also called eligibility rules. These norms suffered several changes since 1994. Eligibility was always a condition to participate in the competitions. And in 1994 one of the requirements to be eligible was not to participate in non-authorized events.

In 1996 that condition is extended to exhibitions. In other words, to be eligible, the athlete could not participate in non-authorized events and exhibitions.

In 1998 a system of pre-authorization was introduced, which meant that athletes could participate in non-authorized events in case they had been authorized by the ISU.

In 2002, the rule 103 adds some clarification to the rules. They expressively declared that Eligibility Rules were to pursue, among others, the objective of protection of the economic interests of the ISU.

In 2014, the rule states the objectives of eligibility norms. Now, this article defines the concept of eligible person. It also declares that the participation in events of other entities would be translated into the loss of the eligibility status. By its turn, rule 103 blocks the reintegration of athletes in the situation described previously.

In 2016 a system of sanctions was introduced with levels of severity and the elimination of the segment that prohibits the reintegration of athletes as well as the conditions under which the reintegration could occur.

At least from 2014, there was also a provision related to the appealing of the decisions by Council of the ISU which stated those decisions could be subject to appeal. The competence to argue that appeal was reserved to the CAS.

2. Conclusions of the Commission and changes operated by the ISU in the 2018 Congress

a. Restriction by object

As it has been previously mentioned in chapter I, to identify a restrictive practice/agreement by its object, it is necessary to take in consideration its content, objectives as well as the legal and economic context.

In what concerns the content of the rules, according to the Commission, it was defined that an athlete would be ineligible to participate in the ISU competitions if they participated in an unauthorized event. Under the 2016 regulations, the margin for reinstatement was short.

In addition, the European Commission finds that the sanctions for those actions were severe and points the lack of an obvious link between those rules and sanctions and the objectives that the ISU claim to protect. Therefore, the content of the rules *"restrict the possibilities for professional speed skaters freely engage in other international speed skating events"*[40] and by that exclude potential competitors, namely organisers of speed skating events: "*in the absence of the Eligibility rules, professional skaters would be able to provide their services to third party organisers of alternative speed skating events, even if they have not been authorised by the ISU."* [41] [42]

The sanctions and the reference to economic interests prove, in the eyes of the Commission, that the objectives were not only *"of a sports nature"* but also other interest that may not be legitimate. The fact that, in some extent, rule 102 protects legitimates aims does not exclude the restriction by object since there are other interests involved.

Within the legal and economic context, the Commission finds that speed skating is generally organized according to a pyramid structure of competitions.[43] One of the

[40] Commission Decision of 8 December 2017 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40208 — International Skating Union's Eligibility Rules), Parag. 163.
[41] Idem. Parag. 163.
[42] The content of the previous versions of rule 102 was also examined by the Commission and contributed for the conclusions. To more details about the content of those version, see Chapter II, 1.c.
[43] For further details see Commission Decision paragraph 172 and "White Paper on Sport" of 11 November 2007, COM (2007) 391 final, {SEC (2007) 932} {SEC (2007).934} {SEC (2007) 935} {SEC (2007) 936

characteristics of that structure is that athletes need to participate in the competitions to make a living from the sports. Subsequently, the most iconic competitions such as the Olympic Games allow for the creation of the necessary revenues.

Taking into account the case-law from the Court of Justice, the Commission established an important limit that sports governing bodies must comply. Where an association of undertakings (in this case, a sport governing body) has the regulatory power and responsibility to organize events (which provides commercial exploitation), it may create conflicts of interests. This conflict of interests tends to reveal distortion of competition. This requires special attention from the association of undertakings.

Although in 2016 eliminated the expressed mention to economic interests in the ISU regulations, the creation of third-party events is still seen as a threat to ISU. Therefore, eligibility rules and its enforcement have the clear intention of foreclose potential competitors through prohibitions imposed directly to athletes: "*their purpose to restrict the possibilities for professional speed skaters to freely participate in international speed skating events organised by third parties and thereby, to foreclose potential competitors from entering the market by depriving them from the necessary services provided by such skaters*"[44]

The Commission also demonstrated that the Eligibility rules were not simply and genuinely designed to protect the values expressed in the 2016 version by giving the example where the sanctions are applied regardless of whether or not the conditions of health, safety, integrity and others are met. One example of that situation is that until the beginning of the procedure, not a single event from a third party was authorized by the ISU. More specifically, when IceDerby applied for an authorization, ISU emitted a communication emphasizing that no authorization would be granted adding that if any athlete participated, rule 102 and respective sanctions would be applied.

Therefore, taking into account the content, objectives and context, Eligibility rules restrict competition by object "*in the worldwide market for the organisation and commercial exploitation of international speed skating events within the meaning of Article 101(1) of the Treaty*." [45]

[44] Idem 35. Parag. 184.
[45] Idem. Parag. 188.

b. Restriction by effect

As we said in Chapter I, normally, when a restriction by object is found, it is not necessary to check the effects. The Commission recognizes that: *" [The Commission] concluded that the eligibility rules constitute a restriction of competition by object. Although it is unnecessary to analyse the effects of the Eligibility rules, the Commission will nonetheless show that Eligibility rules also have as their effect a restriction…"*[46] We can only imagine that, due to the potential importance of the case, the Commission intended to demonstrate in all plausible scenarios eligibility rules were restrictive in the terms of the Treaty.

The Commission mentioned that it is clear from the case-law[47] that, in order to assess the effects of a certain agreement or practice, it is indispensable to evaluate the conditions under which the practice or agreement was taken: economic and legal context, the operating conditions, the nature of the product concerned and the structure of the market in which it is inserted. Moreover, the scrutiny of the agreement or practice must take into account not only the actual or real effects but also the potential effects[48].

The reasoning of the first the Commission may be summarized by the following: the "fear" of being sanctioned and the effects of those sanctions on individual careers prevented athletes from providing their services freely on the market. As a result, without athletes to perform in such activities, the events organized by entities as Icederby are useless and ruined.[49] Icederby tried to organize an event (Dubai Icederby Grand Prix 2014) but as it could not count on the athletes for the event, the initiative ended up being cancelled.

ISU argued that the effects of Eligibility rules were only indirect and *de minimis* but the commission did not agreed. The effects were visible: speed skaters were willing

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[46] Idem. Parag. 189.
[47] Vg. Joined cases T-374/94, T-375/94, T-384/94 and T-388/94, European Night Services and Others v Commission, (1998) ECLI:EU:T:1998:198; Case C-67/13 P, Groupement des cartes bancaires (CB) v. Commission, (2014) ECLI:EU:C:2014:2204. Parag. 51to 53;
[48] Joined cases T-374/94, T-375/94, T-384/94 and T-388/94, European Night Services and Others v Commission, (1998) ECLI:EU:T:1998:198, Parag. 67, 142 -145.
[49] "*The application of the Eligibility rules would be capable of producing adverse effects on competition as this could result in the athletes' unwarranted exclusion from international speed skating events306, and as a consequence, the restriction of the athletes' freedom to provide their professional services."* Commission Decision of 8 December 2017 (Case AT.40208 — International Skating Union's Eligibility Rules)

to attend to that event specially because the prize was attractive, but they were forced to quit. Consequently, the Commission considered that if Eligibility rules did not exist, athletes would be able to freely engage in the events of booth ISU and other organizers.

In this sense, the Commission considers that the rules under scrutiny prevented new competitors to enter the market for the organization and commercial exploitation of international speed skating events. The effect of those rules on the market is relevant especially because it makes ISU and its members the only organizers in the market.

This opinion did not change with the alterations operated in 2016. After this date, the lifetime ban for the participation in unauthorized events is no longer automatic. Instead of guidelines on sanctions, new limits were established for the breach of the Eligibility rules according to the degree of guilt or negligence by the athlete. Yet, it did not convince the Commission since the barriers to the competitors still remains: although the period of ban is shorter, it still does not guarantee the possibility of athletes to freely engage in events organized by other entities. Without this compromise, they cannot enter in the market.

c. ISU regulations and the scope of article 101 (1)

In Chapter I, we had the opportunity to explore the autonomy and "special" attention that sports are given in comparison with other sectors of the economy. Taking this into account the Commission brings back the case of Meca-Medina to determine whether the practices at stake fall within the scope of article 101(1) even though they restrain competition[50]. According to the decision of the Commission, it is necessary to take in consideration "*(i) the overall context in which the rules were taken or produce their effects and their objectives, (ii) whether the consequential effects restrictive of competition are inherent in the pursuit of the objectives and (iii) whether they are proportionate to them."*[51]

[50]C-519/04, David Meca-Medina and Igor Majcen v Commission of the European Communities, (2006) ECLI:EU:C:2006:492

[51] Commission Decision of 8 December 2017 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40208 — International Skating Union's Eligibility Rules), Parag. 210.

According to the aforementioned decision of the Court, the organisation and proper conduct of competitive sport are legitimate objectives of the sports industry. In this sense, the governing bodies implement regulations to not only prevent phenomena such as doping and illegal gambling and/or betting but also ensure safety conditions for the practice of the activity (inclusively through the *maintenance* of a season calendar). Apart from health and safety concerns, ISU also claimed to be defending *"ethical values such as friendship, fairness and non-discrimination"*.

These noble intentions are not mentioned in the regulations. Instead at some point (2014), ISU expressively mentioned that Eligibility rules aim to protect their economic interests, which is not considered a legitimate objective.

The Commission agrees that speed skating, as well as many other sports carry a lot of risks for the participants which means that health and safety of the athletes should be one of the main concerns of governing bodies. That would justify a possible restriction of competition and it is decided that the concerns with the calendar may also be inserted in those reasons. The good functioning of the calendar season could also be a justification for the restriction to competition. However, citing the Court of Justice, the Commission declares that the motives to justify a restrictive practice must be of non-economic nature.[52]

At this point, the commission raises a very important question. This institution doubts on whether the presence of one single regulator body per sport is legitimate of or justified to the ends that that principle pursues. Disregarding that question they proclaim that, the measures adopted by the ISU are neither inherent nor proportionate in the pursuit of those objectives.

ISU fears the consequences of the presence of third-party organisers, namely, free-riding problems. In other words, third-party organisers would take advantage of the ISU's work on administrating and supervising speed skating. But the prevention of economic inefficiencies is still not a legitimate reason for the restriction. Plus, the Commission considers that ISU's arguments and actions are contradictory: ISU defends its position claiming the possible inefficiencies due to free-riding effect; but, at the same time, the

[52] Idem. Parag. 220.

ISU allegedly had a pre-authorization system that was also criticized because of its excessive administrative burden.

To determine whether the objectives were inherent and proportionate, the Commission analyses the reasons that ISU claimed to justify its conduct point by point: integrity, appropriate conduct in sports, anti-doping and safety concerns, protection of the solidarity model, the existence of a pre-authorization system that allows third-party events, the sanctions system and the appeal rules.

i) Integrity, appropriate conduct in sports, anti-doping and safety concerns

This topic is related to the good practice of the activity: following the rules and respect the principles desirable to be kept in practice such as non-discrimination. It is also related to the guarantee sport's safety conditions guaranteeing that the athletes do not put them-selves at risk.

The point focused in this topic was the fact that ISU alleged that one of the aims of the rules at stake was to prevent gambling. In other words, illegal bets concerning match-fixing.

The Commission founds interesting this objection of ISU before betting since one of the Members (the Dutch Federation) is financed by the lottery and it was never punished or receive a reprimand because of that. Plus, it adds that betting is not prejudicial to sports. In fact, it is part of it in its very essence and they walk hand to hand since the origin of sports; only gambling related with match-fixing is prohibited.

Besides, ISU did not prove that Icederby had a plan of incentives to gambling. It would be acceptable to prohibit athletes from gambling. The Commission points that it is not acceptable for the ISU to demand a certain conduct to potential event's organisers that even they cannot fulfil. Therefore, the eligibility rules are not considered acceptable to pursue the integrity of sports in the eye of the Commission.

The same was concluded for the health and anti-doping issues. ISU can only demand measures to ensure the same medical resources that ISU also provides in their

events. Regardless, the Commission finds that Eligibility Rules are not the adequate mean to achieve this goal.

In what concerns appropriate conducts and good functioning of the calendar, the EC reminds that IceDerby proposed an event during the off-season, so the ISU calendar would not be affected. Besides, ISU also clearly prevents innovation in the sector since IceDerby wanted to introduce new formats for athletes to compete. By imposing such severe sanction to the participation on these events, the Commission defends that it prevents innovation.

ii) Solidarity model

According to the International Olympic Committee[53], the solidarity model refers to a method of organisation of the sports to ensure that all athletes from every country and all sports have a equal chance. It is a non-profit-orientated principle focused in the redistribution of revenue across the organisation of various events, development of sports and integration of youth: *"...this solidarity model makes universal participation at the Olympic Games possible, creating more equality among participating NOCs, and more equality for participating athletes and their sports."*[54]

There might be vertical solidarity or horizontal solidarity. Vertical solidarity refers to, "*redistribution of revenues from the elite/professional level of a sport to the low/grassroots level"*[55]. In turn, the horizontal solidarity is revealed, for example, "*equal distribution of revenues to all the clubs participating in the same competition"*[56].

Without further discussion, the Commission found that the protection of the solidarity model and volunteering could be a justification for restriction. However, ISU was not able to show how the rules under evaluation are part of a strategy to protect those values. The Commission suggests a contribution designed to finance other events or

[53] "IOC Welcome German Athletes to Discuss Solidarity Funding Model" available at https://www.olympic.org/athlete365/voice
[54] Idem. 1º point, *in fine*.
[55] Commission Decision of 8 December 2017 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40208 — International Skating Union's Eligibility Rules), Parag. 222
[56]Idem.

members charged to third-party organisers would be acceptable under certain circumstances and prevented equally the solidarity.

It also recognized that events of ISU are dependent upon the volunteers activity and the revenues are necessary to finance the cost of those volunteers (reimbursement of travel costs, for example) but the conclusion is peremptory: *"the Eligibility rules are more restrictive than necessary to ensure that the ISU functions properly."*[57]

i) Pre-authorization system

The pre-authorization system consists of a group of criteria that third-parties would have to fulfil in order to obtain the approval of ISU and, consequently allow affiliated athletes to participate without suffering any sanction. ISU justifies the need to have this system in order to follow the standards for the practice of sports.

Following the reasoning of *Wouters*[58], the Commission discards the examination of this type of procedure because its existence should be *"justified on the basis of specific facts and evidence related to the features of the sport"*[59] which was not proved. Plus, the *ex ante* control system constitutes an exception in sports and not the rule. The example given by the Commission is the Olympic sports where events are organized by third parties.

Nevertheless, even if the pre-authorization system was acceptable, in the perspective of the Commission, the method applied is disproportionate. first of all, it imposes discriminatory conditions for Members and third-party organisers, namely, disclosure of financial information obligations and even in the deadlines to ask for the authorization; also, it is not fully transparent, giving a large margin of discretion to ISU's bodies to decide.

ii) Sanctions

[57] Idem. Parag. 250.
[58] Case C-309/99, J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap, 19 February 2002. ECLI identifier: ECLI:EU:C:2002:98
[59] Commission Decision of 8 December 2017 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40208 — International Skating Union's Eligibility Rules), Parag. 253.

The types of sanctions were, mainly, on article 25.9. The implementation of sanctions within the sport's governing bodies aims to prevent and punish behaviours that violate the sporting rules, such as doping, corruption and, in this case, the participation in non-authorized events. In general, these sanctions are acceptable but its extension to the violation of Eligibility rules is disproportionate[60].

ISU alleged that the application of sanctions due to the violation of eligibility rules were rare and, when they existed, it was made accordingly to proportionality test. For the EC, it is not relevant how many times and the way the sanctions were *de facto* applied. The fact that it is laid down on the rules have a deterrent effect. Even though ISU implemented some changes in 2016, in the view of the Commission, sanctions that might go up to 10 years are still disproportionate having in the consideration the average time of a speed skater's career.

Additionally, neither the constitution and regulations or the guidelines on sanctions do provide specific criteria for the determination of the sanction. The aforementioned documents only provide time limits for the sanctions in case of infringement of Eligibility rules but not clarification on how they should be applied. The Commission stands for a more transparent system of sanctions: *"the Commission notes that there are no pre-established, clear and transparent criteria as to how the sanctions are to be applied (...) The wording of Rule 102(7) b) of the 2016 Eligibility rules confirms the wide discretion of the ISU Council."*[61]

iii) Conclusions of the Commission

After analysing all the arguments invoked by ISU, the Commission declares that some of the Eligibility rules are neither fundamental nor proportionate meanings to achieve the objectives claimed by that sport's governing body: those results have, as a consequence *"restriction of the athletes' commercial freedom to participate in international speed skating events organised by third parties and the foreclosure of*

[60] Idem. Parag. 260.
[61] Idem. Parag. 265.

potential competitors in the market for organisation and commercial exploitation of international speed skating events[62]*".*

iv) Appeal Rules to the Court of Arbitration for Sports

The appeal rules are also explored in this procedure because they were considered a tool to reinforce of the restrictions that were previously found.

The regulations under the scrutiny of the European Union body contained a section reserved to the appealing of the decisions from the Council, which was the entity inside ISU structure that had, *latu sensu*, sanction power.[63]

Rule 25 of the ISU constitution and general regulations conferred to the CAS the exclusive competence to decide the appeals from the decisions aforementioned. The awards given by the CAS were definitive according to that norm.

At the first sight, it seemed that there was no other option: the only way to challenge a decision of the Council that applied a sanction to an athlete was by appealing before the CAS.

However, that is not true. It was possible to appeal from the awards of the CAS by pleading to the Swiss Federal Court but under very strict circumstances. According to Rule 59 of the Code of Sports-related Arbitration, the decisions of the CAS may be subject to appeal under the swiss law. In this sense, those awards may be challenged under the following circumstances:

"a. If a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly;

b. If the arbitral tribunal erroneously held that it had or did not have jurisdiction;

c. If the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims;

d. If the equality of the parties or their right to be heard in an adversarial proceeding was not respected;

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[62] Idem. Parag. 266.
[63] Art. 17, Number 2, al.) g) of the ISU constitution.

e. If the award is incompatible with Swiss public policy (ordre public)."[64]

The Commission found that typically, this type of clause does not constitute *per se* any infringement to the European principles and rules. However, in this specific case, it is inserted in a system that imposes several barriers to the competition. This clause appears to aggravate that situation and creates more obstacles for the athletes to have access to other competitions and events and consequently, prevent or create adverse conditions for other actors to enter on the market.

After the Commission's decision, the ISU Congress did not exclude the clause that reserved the exclusive jurisdiction of the CAS to argue the appeals of decisions from the Council. Instead, ISU regulations now refer that the awards of the CAS could be challenged according to the swiss law or the procedural rules of the countries where it acts as public interest.

In our opinion, the measures taken by the ISU in this context were, in fact, none. They just transposed to their rules something that always existed. ISU rules never had the power to undermine national and international legislation. Therefore, the fact that in the previous versions of those statutes did not mention that the awards of the CAS could be challenged in those circumstances, does not mean that that possibility was excluded since the national law is above any of those particular regulations, especially in matters of public interest.

Under those circumstances, if the eligibility rules did not suffer fundamental changes, this legal disposition remains inadmissible, in the light of the Commission's rationale.

It is also a fact that this is not new. Similar considerations were discussed by the German Supreme Court in the Pechstein case and by the Belgian Courts more recently.

The Pechstein case as exclusively related with ISU's arbitration clause. It was brought by a German athlete called Claudia Pechstein that claimed that she had not voluntarily agreed with that clause. She also argued that the independence of the CAS

[64] Art. 190 and 191 of the Swiss Federal Act on Private International Law.

panels was dubious since they were invariably composed by members of sporting federations or persons that had held those functions.

In this case, the German Supreme Court upheld the decision taken by the CAS and stated that the CAS was an independent tribunal. Still, Pechstein took the question to the European Court of Human Rights who analysed the acceptance of the arbitration clause in the light of art. 6 of the ECHR. This Court condemned Switzerland and stated that the arbitration clause was forced therefore, infringing art 6 p.1 of the Convention. The court found that the athletes had two options: to accept the arbitration clause and practicing that activity at a professional level or not to accept that clause and give up from that practicing.

In another case, the Belgian courts (Brussel's Court of Appeal) addressed similar questions. In this case, a Belgian football club (RFC Seraing) was banned from registering athletes for four consecutive registration periods due to an alleged violation of the rules on the FIFA Third Party Ownership rules[65]. The violation of those rules was based on the interference of an investment fund (Doyen Sports).

In this scenario, RFC Seraing appealed that decision before the CAS which reduced the period of ban to 3 consecutive registration periods. Unsatisfied with such result, RFC Seraing and Doyen Sports appealed before the Swiss Federal Court[66] arguing that the CAS was not an independent tribunal and that FIFA regulations interfered with the economic freedom of the cubs. Besides, they also challenged the same decision before the Belgian courts (Belgian Court in Liége and, after, Belgian Court of Appeal). The appellants asked for the suspension of the CAS award and the ordering of URBSFA[67] to allow the registration of athletes. Both of them were denied by the court of first instance and the appealing court. However, the Belgian Court of Appeal had to analyse its own competence to argue that cause due to the arbitration clause that conferred jurisdiction to the CAS and not the Belgian Courts.

[65] Section V of the FIFA Regulations on the Status and Transfer of Players.
[66] The decision was taken in February 20th, 2018 and the proceedings are identified with the number 4A260/2017.
[67] Idem. And, SFT Judgment 4A_260/2017 of February 20, 2018 (motion to set aside the CAS Award TAS 2016/A/4490

In this subject the Belgian court had to consider the arbitration clause of FIFA statutes and it concluded that such legal clause could be challenged. According to Belgian law, the arbitration clauses must concern to a "specific legal relationship". The one analysed in the case was too vague and general and did not comply with those requisites. Therefore, the court rejected the submissions of FIFA, UEFA and URBSFA found itself competent to adjudicate that issue.

The case of RFC Seraing focused on the arbitration clause and in similarity to the Pechstein case, the court concluded that the parties did not voluntarily agreed in such clause. It was a "take it or leave it" scenario. Nevertheless, the practical implications of the aforementioned decisions are very limited since there is no real alternative to the CAS. In addition, the enforcement of the decision would put the sports industry in a very difficult situation and have a negative impact at all levels (social, legal, economic…)

In our perspective, to reverse the situation that ISU has put itself into demands a radical change of the scenario. In one side, it faces a threat from the Commission that already argued that such clause constitutes a violation to competition rules. on the the other side, there are judicial bodies stating that such clauses are not even admissible for the violation of national law and, in the case of ECHR, international conventions. This forces ISU to assume a disruptive posture through measures that would actually give athletes and other actors involved real instruments to obtain a fair trial and, in consequence, not restrain competition in the internal market. However, such interference would be very dangerous.

These decisions may be a big help for the comprehension and development of sport regulations and its particular characteristics but the question remains: either we have this forced arbitration or we submit the conflict to ordinary jurisdiction which proved to be dangerous due to the length of the proceedings, lack of specific education of the judges in the area and the variety of rules that would be applicable from country to country.

d. Application of Article 101(3)

As it was mentioned in chapter I, the Treaty considers that in certain conditions, article 101 (1) might not be applicable under certain conditions which are described in

article 101 (3). To assess the applicability of article 101(3), the Commission evaluates four conditions that follows the Court of justice case-law and the work of the European institutions in the development of the primary sources of law.

As we mentioned in Chapter I, the first condition, according to *Remia*[68] and *MasterCard*[69], "*only the objective advantages resulting specifically from that decision may be taken into account"*[70]. In other words, to evaluate the contribution to the improvement of production and distribution of goods it is not relevant the subjective perspectives or prediction of the parties; only the factual elements that the agreement produces. To examine this condition, the Commission presents several reasons to help determine whether it is or not fulfilled:

- It is not detectable any real efficiency gains with the implementation of the Eligibility Rules;
- Those same rules impede the creation of new events which would bring innovation for the sector.
- The fact that there is no transparent authorization system that does not go beyond what is necessary to protect legitimate aims confirms that situation. The attempts of Icederby to create new formats in the off-season period that was denied.
- The absence of clear and non-discriminatory criteria cannot be seeming as indispensable measures for the protection of the calendar.
- *"Preventing the organisation of such off-season events cannot serve the proper functioning of the ISU calendar"*[71]
- The Eligibility rules and the absence of an authorization system like configured before reduces the choices of the consumers.

The Commission considers that article 101(3) refers to the concept of "fair-share", which means that the "*benefits must at least compensate consumers for any actual or*

[68] Case 42/84, Remia BV and others v Commission of the European Communities, (1985) ECLI:EU:C:1985:327. Parag.47.
[69] Case C-382/12 P, MasterCard Inc. and Others v European Commission, (2014) ECLI:EU:C:2014:2201. Parag. 231.
[70] Idem. Parag. 231 *in fine*.
[71] Commission Decision of 8 December 2017 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40208 — International Skating Union's Eligibility Rules),

potential negative impact caused by the restriction"[72]. As a result, it demands a balance between the positive and negative impacts for the consumers of the relevant market constitutes the second requisite for the applicability of article 101(3). As it was mentioned in the previous points, due to Eligibility rules, the choices of the consumers are limited and they are deprived of the innovative formats that were meant to be introduced by Icederby, for example. Therefore, the negative impact is superior to the gains on efficiency invoked by the ISU.

The third condition is extracted from the Commission Guidelines on the application of Article 81(3) of the Treaty (now article 101(3)) which refers to the indispensability of the agreement to achieve the purpose[73]. The agreement at stake and its effects must be reasonable and necessary to accomplish the efficiencies. The Commission does consider the eligibility rules neither reasonable nor necessary to achieve the purposes claimed by the ISU, since there are less restrictive means. For example, the objective of protecting the calendar cannot be admitted since the proposals of Icederby were to occur during the off-season period.

The last condition requires an analysis of the actual and potential competitors before and after the agreement and its impact which *requires "a realistic analysis of the various sources of competition in the market, the level of competitive constraint that they impose on the parties to the agreement and the impact of the agreement on this competitive constraint"*[74]. Regarding this point, the Commission finds that all the competition in the relevant market is eliminated on count of Eligibility Rules. Such rules create barriers that impede the access to the services provided by the athletes which are necessary to the organization and commercial exploitation of speed skating events.

Concluded the test, the cumulative conditions for the application of article 101(3) are not met, so there is no place for the application of the exemption.

e. Alterations operated by the 2018 Congress

[72] Commission Decision of 8 December 2017 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40208 — International Skating Union's Eligibility Rules). Parag. 290.
[73] Commission Guidelines on the application of Article 81(3) of the Treaty, Paragraph 73.
[74] Idem. Paragraph 108; and Commission Decision of 8 December 2017 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40208 — International Skating Union's Eligibility Rules). Parag. 292.

The Commission concluded that the rules of the ISU constitution examined in the procedure constituted an infringement to article 101 of the TFEU. Therefore, the ISU had 90 days to cease the infringement, otherwise, after that ISU would be subject to daily penalty of 5% of its "*average daily turnover in the business year preceding such a failure to comply pursuant to Article 24(1) of Regulation (EC) No 1/2003. This penalty will be calculated as from the first day after the infringed order takes effect."*[75]

In this sense, "*to fulfil the Council's commitment of the European Commission"*[76], the 2018 ISU Congress in Seville, the commitment made to the European Union regarding the alteration of the Eligibility rules were one of the main points of the agenda[77].

In summary, the most significant change (in terms of textual length) was the introduction of all principles that ISU aims to pursue such as integrity, safety, good functioning of Skating and others. The proposal from the ISU Council implemented a list of objectives that article 102 aims to pursue and the means to achieve them. We could say that those principles ere the ones claimed by ISU in their allegations and afterward examined by the Commission: integrity, health and safety, etc.

It also eliminated all references to financial or any other particular interest of the ISU and replaced by general and abstract interests inherent to sports. For example, before the 2018 Congress, the rule 102, paragraph 1.a). iii) rule referred the eligibility condition was adequate to protect "*jurisdiction objectives and other legitimate respective interests of the ISU, which uses its financial revenues for the administration and development of the ISU sports disciplines and for the support and benefits of the ISU Members and their skaters"*; after that Congress in the same paragraph we may read the following: "*the condition of eligibility is necessary to achieve the following objectives of the ISU: protection of the ethical values of Skating, integrity, health and safety as well as the good functioning of Skating…"*[78]

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[75] Commission Decision of 8 December 2017 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40208 — International Skating Union's Eligibility Rules). Page 80, article 4.
[76] International Skating Union, Communication No. 2156, Agenda of the 57th Ordinary Congress, Seville 2018, Page 20 - 26, paragraph 38, 39,45, 46, 47, *in fine*, "Reasons".
[77] International Skating Union, Communication No. 2156, Agenda of the 57th Ordinary Congress, Seville 2018, Page 20 – 26.
[78] International Skating Union, Communication No. 2156, Agenda of the 57th Ordinary Congress, Seville 2018, Page 20, Paragraph 38 "ISU COUNCIL on rule 102, paragraph 1.a)".

Although paragraph b of rule 102, paragraph b was not in the rules transcript and often mentioned or criticized by the Commission, it was changed in the Sevilla Congress. As we will see in the next chapter, the vocabulary used in the rephrasing of this point was not the most enlightening. In our point of view it was used as an attempt to open the door for the participation in third party events. To achieve that purpose, this governing body reframed the definition of "eligible person" and describes an eligible person as the *"one who elects to take part only in International Competitions which are: (...) conducted under ISU Regulations (subject to any novelties approved by the ISU Council thus exempting them from the otherwise applicable ISU Rule)"*[79]. By adding this, the ISU allows the participation in other events and, also makes a reference to the authorization of third events (other than their own).

Regarding paragraph 7 of rule 102, the ISU Council also proposed (and the Congress implemented) three fundamental changes: first, it eliminated the "automatic" condemnation to loss of eligibility as a consequence of the breach of eligibility rules; the mentions to the large discretionary margins of the Council were eliminated; ISU regulations also count with procedural rules in case of breach of eligibility rules (that at first sight gives athletes and officials the right to a fair hearing); it was created the procedural rules to apply in case of breach of eligibility rules. This new procedure gives, at first sight, to the athlete or official the right to a fair hearing, chances to defend themselves and criteria to the application of sanctions.

To finish, in rule 103 that refers to the reinstatement of an ineligible person, the references to lifetime ban were excluded.

[79] International Skating Union Constitution and General Regulations 2018 as accepted by the 57th Ordinary Congress June 2018, Section B. Eligibility, Rule 102, paragraph 1.b.iii).

Chapter III
The change of paradigm in sports – one step forward?

This decision may be determinant for the maintenance or change of the fundamental structure of sports industry. The beginning of the procedure raised a lot of concerns in the ISU Congress. In the Minutes of the 2016 Congress[80], by the time of the discussion of the 3-years budget, Mr. Fredi Schmid (Director General and Secretary of that meeting) highlighted the difficult situation of ISU due to the investigation of the Commission and suspicions of corruption and other issues which were affecting the structure.[81] And the entire sports world should not be indifferent to this procedure.

The governing bodies should indeed take this procedure seriously. In 2008, the Court of Justice was confronted with similar matters in the MOTOE case[82]. In this case, the first problem analysed by the court of Justice was whether ELPA (the entity empowered to represent the International Motorcycling Federation in Greece) should be considered subject of European Competition Law.

It is true that the Court examined if ELPA was violating article 102 of the TFEU (abuse of dominant position) and in the ISU case, the Commission investigates a possible violation of article 101. However, it is clear that one of the core questions is conflict of interest that may arise between the regulatory power and the activity of organisation and exploitation of sports events.

In MOTOE, *"…there was no doubt that the de facto conferral of 'the power to designate the persons authorized to organize those events and to set the conditions...' placed ELPA in an unequal position compared to its competitors, since it was not subject to external consent in the regulatory process. However, the Court does not appear to be overly concerned with the equality approach. If it were, the grant of special powers would always be wrong in itself, a position which the Court has avoided taking both in MOTOE and earlier judgments."*[83]

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[80] Minutes of the 56th Ordinary Congress, Dubrovnik 2016, available at https://www.isu.org/inside-isu/rules-regulations/isu-congresses
[81] Idem. Page 72.
[82] Case C-49/07, Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio, (2008) ECLI:EU:C:2008:376.
[83] Samuli Miettinen, "Policing the Boundaries between Regulation and Commercial Exploitation: Lessons from the MOTOE Case", *The International Sports Law Journal*, 3-4(2008),

From a different perspective, one could say that the question is the incompatibility of the pyramid system with EU law: *"in general, the framework for a competition and the "rules of the game" are established and determined by sport organizations which are usually characterized by a monopolistic pyramid structure (…) This kind of organization and structure being responsible for creating the "market" and the competition sets it also apart from other economic operators (principle of a uniform and coordinated organization)."*[84]

In chapter I, we had the opportunity to take a general view about this subject, namely, the Commission's opinion about the interaction of sports governing bodies and EU competition rules. Nevertheless, the ISU case touches the pillars of the organisation of governing bodies and an essential point such as the organisation and commercial exploitation of events.

It is fact, there is the possibility of the Court of Justice to reverse the findings of the procedure since ISU appealed for this institution. If that happens the Commission's work should not be in vain: sport's governing body should take this as an alarm, think and reframe the organisation of sports events because the conclusions achieved so far may be the pillars to next time the revolution in sports industry does not fail. As it happened after *Bosman*[85], European Union institutions had a determinant intervention. The protection of the internal market as priority and the immunity before sports effects gives the EU the necessary shield to operate crucial changes in the sports model which may produce worldwide effects. So, we believe that this change of paradigm will change sooner or later.

On the other hand, the Court may also agree to this decision and add its contribution to the big step taken by the Commission. If the Court takes this position, it will only rush a process that should be very well considered and debated.

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https://www.asser.nl/sportslaw/publications/international-sports-law-journal/archive-islj-volumes-2002-2012/

[84] Andreas Manville, "European Court vs Sports Organisations - Who Will Win the Antitrust Competition?", *The International Sports Law Journal*, 3-4 (2008), https://www.asser.nl/sportslaw/publications/international-sports-law-journal/archive-islj-volumes-2002-2012/

[85] Case C-415/93, Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman, Royal Club Liégeois SA v Jean-Marc Bosman and others and Union des Associations Européennes de Football (UEFA) v Jean-Marc Bosman, (1995) ECLI:EU:C:1995:463

It may also happen that the Court adopts a neutral position, in other words, not fully agree with one of the parties but in this case, it does not seem very possible. After admitting that the ISU is subject to EU law and that there is no place for the application of article 101(3), the conclusion seems obvious.

We find that the decision was adequate and there is not a large margin for the court to disagree and the similitude with MOTOE's case is too big to deserve a different solution. The Commission examined all the point of the norms and applied all the tests from the previous case-law. However, admitting that the Court of Justice will follow the same path, we believe that this decision is extremely dangerous not only for the ISU but for all the sports that operate under the pyramid structure (such as football for example). The market is not exempted from those risks.

Before that we have to say that from the first pages of the document produced by the Commission, there was not much doubts about how the case would end. It was quite clear that one way or another the European institution would find an infringement. With this statement we are not saying that it was a biased procedure. Instead we believe that the irregularities in sports market were evident (or at least, close of being evident) and the explanation for such *status quo* was not so understandable.

Therefore, once some of the details (such as the classification of ISU as an association of undertakings or the definition of the market of organisation and commercial exploitation of sports events to EU competition law) were solved, the ending seem inevitable. Neither the sports nor the market is ready for the implications that the final conclusion of this case may have. We believe that it is quite clear that ISU let this procedure go too far and the effects may be enforced not only in the speed skating and figure skating world but in the entire structure of the sports industry.

Also, taking into account what was described first, the impression that ISU should not let the procedure last until its end. The decision shakes the ISU structure but also all the sports that work in the same logic. However, sports are not ready to such structural change in such a short period of time. The adoption in speed skating of the system of open competition (v.g. tenis) does not seem an adequate and suitable alternative.

As we demonstrated in the previous chapter, competition law examination is composed by a significant part of subjective test and not only real facts are analysed but also potential and implicit manifestations of the agreement or concerted practices. As a result, the exclusion of the financial interest from rule 102 in 2016 Congress was extremely naïve.

The dimension of the question required a more drastic change of the regulations. Even if the financial situation was not magnificent and the stability of ISU was being prejudiced by accusations of "bad governance", giving authorization to a third-party to organize an event (even it was a small one) would constitute a demonstration of good faith from ISU that would end up the Commission's investigation, delay it or, at least, give ISU new and powerful facts to take before the ECJ in the appeal.

Further, it is true that one of the facts that contributed to the decision was the express mention to the protection of financial interests before the 2016 version of the ISU constitution and regulations. We already mentioned that the simple exclusion of that from the Treaties was insufficient. However, even after the verdict of the EC, the solutions found by the Congress seemed risky and inadequate since the changes to the regulations do not appear to be substantial and capable of producing practical effects in the market.

As we found in Chapter 2, the examination of the violation by effects requires a subjective analysis. The solution found in the 2018 Congress was basically to change the way the rule was written and how it expressed ISU's interests. We defend that formal alterations are not sufficient to solve the problem nor adequately executed. To accomplish the guidelines of the European Commission, the ISU will have to apply other measures apart from the single inclusion of certain principles. Certainly, the ISU must always operate according to their statutes but the nature and effects of the eligibility rules in the market can only be changed through more specific methods.

In other words, to attain the Commission warnings, the priority of ISU politics should not be transposing their allegations to their regulations. Instead, they should have taken the decision as a guideline to actually adopt less restrictive means to achieve those values and conciliate with the best solution possible for the market and themselves.

Since we mentioned the text of the new rule 102 of the ISU regulations, we should also point out that the new vocabulary does not make the interpretation of that rule easy and may lead to misunderstandings. For example, for the same diploma we have the exact same word with completely different meanings. Rule 25, paragraph 9, under the term "sanctions", ISU presents a list of actions that may be taken in order to correct violations of those rules; later, in rule 102, paragraph 1.b), it the same term sanction is used (or sanctioned, to be more rigorous)[86] this time referring to a person, entity, competition or events that unites all the requisites to be considered a eligible.

One might say that this is a minor question but taking into account the effects that the decision may have and the heavy sanctions that it may carry if the ISU does not change Eligibility rules, the wording of the rules cannot be a minor question. Now, the discipline of the Eligibility rules should be clear and in perfect coherence with the rest of the internal constitution and regulations of ISU.

1. Possible Solution

We believe that, to prevent the impact of the enforcement of the EC's decision, sports governing bodies should implement new strategies in a close future. In the specific case of ISU, we think that the improvement of the authorization system is the best solution for this particular matter. The model of this system should be created taking into account the principles that the Commission demands to be respected. Accordingly, the main principle to guide this system would be non-discrimination between Members and non-members. In the existing model, the Commission pointed out that the deadlines and the amount of information that had to be revealed to the ISU (namely in the financial plan) was not equal since non-members had much more heavy burdens.

To protect solidarity and voluntary model, the Commission admitted the possibility to demand a safeguard contribution. Once again, this contribution would have to be equal or proportional to both members and non-members.

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[86] *"As the ISU is only able to adequately protect and enforce these objectives in events which have been* ***sanctioned*** *by the ISU, it is indispensable to the attainment of these objectives that an eligible person is one who elects to take part only in International Competitions which are: i)* ***sanctioned*** *by the ISU, if the type of event falls under the jurisdiction of the ISU based on Article 3 of the ISU Constitution"* - Communication No. 2156, Agenda of the 57th Ordinary Congress Seville – 2018, p. 20.

This contribution could also count with the administration costs that ISU claimed they would have to support due to free-riding behaviour. However, these costs would have to be clarified.

Since one of the main functions of ISU is to protect the integrity, health and safety of participants and officials, good conduct in sports and others, to ensure the safeguard of those values, ISU could constitute and demand the presence of multidisciplinary supervising groups to guarantee the respect of those objectives in events that were not organised by the ISU. However, these groups should not only be sent to events of non-members but also to events of ISU members. These costs should be incorporated in the contribution indicated before.

A similar solution was adopted by the Portuguese regulator of the professional football league[87]. At least in the first division of the professional football league it must count with the presence of the delegate from the governing body (Liga Portugal). This delegate is responsible to guarantee good practices during the game and by the end of the match he/she should produce a report mentioning all the relevant facts. For example, during the game he should be in the field and before while after the game and during the pause of the match, he/she must be in the corridors; if there are no conditions to play the match due to weather conditions, for example, he must report all that he saw, listened, analysed in the field and describe the surrounding conditions

With this solution, ISU covers not only their economic concerns (namely with free-riding and excessive administrative costs) but also reinforces its leadership position in the Skating sports which was one of the concerns expressed in the 2016 Congress[88].

To conclude, we believe that the solution relies not on the wording of the rules but in the reformulation of the authorization system according to the demands of the Commission. Plus, this system should be improved over the time under the non-discriminatory principles and equilibrium between the legitimate aims of the ISU and the competition law.

[87] "Liga Portugal"
[88] Minutes of the 56th Ordinary Congress, Dubrovnik 2016, available at https://www.isu.org/inside-isu/rules-regulations/isu-congresses. Page 72.

Conclusion

The European institutions are definitely the only entities capable of making a substantive change in the current organizational structure of sport. This process already began with Bosman, which was one of its highest points. However, it is a slow process and full of advances and retreats. Nevertheless, the good development of this sector depends on the European Union's intervention due to its predominant role at political level and also for the values it entails when intervening in the field of sport.

There was a great opportunity for this change of paradigm in the MOTOE case. Yet, as we have seen, this opportunity has been lost. Currently, the ISU regulations provided a very similar conditions to MOTOE case so that this change can finally operate. In our analysis, we noticed that the Commission has taken all steps to demonstrate that in fact the ISU - and to a certain extent all pyramidal sports structures - are (or may be) in breach of structural European principles, such as free competition in the internal market.

In this way it was demonstrated the need to rethink the organizational structure of sport and especially the monopolistic configuration of sports events and competitions.

The current influence of sport not only on the market but on various aspects of society calls for this reform to be carefully considered and implemented. However, the ISU put too much into evidence those legal weaknesses of the pyramid structure thus precipitating that change.

In fact, the process has not yet ended, but a decision contrary to what has already been taken, as well as very difficult to guess, could lead to a dangerous stagnation of sports structures. As we have mentioned several times, in the case of the MOTOE case, there were excellent conditions initiate these amendments, but the shot was not taken. This second opportunity cannot be wasted again. We defend that the decision of the European Commission should be supported by the ECJ and enforced.

Finally, we identify as the heart of the whole issue the monopolization of sports events and competitions. For this reason, we propose a medium-term solution to the adoption of a system of open and functional prior authorization. Besides, all the legitimate sporting concerns would be ensured by groups of delegates from the governing bodies

that would monitor and ensure the uniform application of the basic standards either in events from the governing bodies or third-party events that acquired prior authorization.

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